

**PERCON CORP SDN BHD***a*

v.

**YAP CHOON LOY**

COURT OF APPEAL, KUALA LUMPUR

*b*

SITI NORMA YAAKOB JCA

MOKHTAR SIDIN JCA

MOHD NOOR AHMAD J

[APPEAL NO: W-02-143-96]

19 JUNE 1998

*c*

**CIVIL PROCEDURE:** *Time - Extension of time - Application added to originating motion seeking to set aside award - Whether such application properly made - Whether there was a procedural defect - Rules of the High Court 1980, O. 3 r. 5(1)*

*d*

**CIVIL PROCEDURE:** *Time - Extension of time - Discretion of the court - Whether delay in filing originating motion had been satisfactorily explained - Rules of the High Court 1980, O. 3 r. 5(1)*

Following arbitration proceedings initiated by both the appellant and the respondent before a court appointed arbitrator to determine disputes arising from a construction contract, the arbitrator published his award by notifying the solicitors that the award was ready for collection subject to his fees and expenses being paid in full. Owing to the delay in the payment of the fees and expenses, both parties only received a copy of the award on 21 July 1995. Under the award, the appellant was to pay the respondent RM510,560 being the compensation due for the premature termination of the construction contract.

*e**f*

Upon receipt of the award, the respondent's solicitors made written demands to the appellant's solicitors for payment. Since there was no response from the appellant, the respondent filed an originating summons on 23 August 1995 seeking leave to enforce the award – but later withdrew the same. On 1 September 1995, the appellant filed an originating motion under s. 24(2) of the Arbitration Act 1952 ('the AA') to set aside the award dated 22 May 1995. On 28 September 1995, the respondent filed a second originating summons seeking substantially the same prayer as the first originating summons.

*g**h*

The respondent averred that the appellant's originating motion was barred by time as there had been non-compliance with O. 69 r. 4(1)(b) of the Rules of the High Court 1980 ('the RHC') which stipulates that an application under s. 24(2) of the AA may only be made within six weeks after the award has

*i*

- a* been made and published to the parties. The respondent contended that time had expired on 3 July 1995 (six weeks from 22 May 1995). The appellant, realising this, filed a second affidavit in the originating motion seeking leave to amend the originating motion to include a prayer for an extension of time. The respondent did not object.
- b* The learned judge held that the application for an extension of time had not been properly brought before him and he dismissed the amended originating motion without hearing the merits of the application. The appellant appealed against that ruling.
- c* The issue for consideration was whether there was a proper exercise of discretion when the learned judge refused to grant an extension of time. The learned judge had based his decision on his findings that there had been a procedural defect as the application had not been properly brought before him. He stated that: (i) based on O. 3 r. 5 of the RHC, it should have been made separately and not added to the same originating motion seeking to set aside the award and; (ii) there was insufficient evidence to warrant an exercise of his discretion.
- d*

**Held:****Per Siti Norma Yaakob JCA**

- e* [1] Order 3 r. 5(1) of the RHC does not stipulate the necessity for a separate application for an extension of time. It merely empowers the court with the discretion to extend or abridge time and, in the circumstances of this appeal, it was to extend the six-week period to cover the period from 3 July 1995, when the six-week period expired, to 1 September 1995 when the originating motion was filed.
- f*
- [1a] The trial judge had therefore misdirected himself when he held that an application for an extension of time had to be made separately and could not be prayed for in the same originating motion seeking to set aside the award.
- g*
- [2] The appellant was under the mistaken belief that time only started to run from the date of the receipt of the award on 21 July 1995. The appellant's legal advisers were not aware of the implications of O. 69 r. 4(1)(b) of the RHC and the appellant was not aware that its former solicitors had received the notification earlier.
- h*
- [2a] Another cause for the delay was the time taken by the parties to negotiate the extent of their respective contributions towards the arbitrator's fees and expenses.
- i*

[2b] The delay therefore had been satisfactorily explained. The learned judge did not consider these matters as he was more concerned that the application for extension of time be separately filed; had he done so, he would have arrived at a different conclusion. a

*[Appeal allowed.]* b

***[Bahasa Malaysia Translation of Headnotes]***

Berikutan prosiding timbangtara yang dimulakan oleh kedua-dua perayu dan responden di hadapan seorang penimbangtara yang dilantik oleh mahkamah untuk memutuskan pertikaian yang timbul daripada kontrak pembinaan, penimbangtara telah menerbitkan awardnya dengan memaklumkan peguamcara bahawa award tersebut telahpun sedia untuk dikutip tertakluk kepada yuran dan perbelanjaannya dibayar sepenuhnya. Oleh kerana kelewatan dalam membayar yuran dan perbelanjaan, kedua-dua pihak hanya menerima salinan award tersebut pada 21 Julai 1995. Di bawah award tersebut, perayu dikehendaki membayar responden RM510,560 yang merupakan pampasan untuk penamatan awal kontrak pembinaan tersebut. c

Setelah menerima award tersebut, peguamcara responden telah membuat permintaan bertulis kepada peguamcara perayu untuk bayaran. Oleh kerana tidak ada sebarang jawapan daripada perayu, responden telah memfailkan saman pemula pada 23 Ogos 1995 meminta kebenaran mahkamah untuk menguatkuasakan award tersebut – tetapi kemudiannya telah menarik balik saman tersebut. Pada 1 September 1995, perayu telah memfailkan suatu usul pemula di bawah s. 24(2) Akta Timbangtaraan 1952 ('AT') untuk mengenyepikan award tersebut yang bertarikh 22 Mei 1995. Pada 28 September 1995, responden telah memfailkan saman pemula yang kedua yang mana permohonannya adalah sama seperti yang dipohon dalam saman pemula yang pertama. d

Responden telah menyatakan bahawa usul pemula perayu telah dihalang oleh masa kerana terdapatnya pelanggaran A. 69 k. 4(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang menyatakan bahawa suatu permohonan di bawah s. 24(2) AT hanya boleh dibuat dalam tempoh enam minggu setelah award dibuat dan diterbitkan kepada pihak-pihak. Responden telah berhujah bahawa masa telahpun tamat pada 3 Julai 1995 (enam minggu dari 22 May 1995). Perayu setelah sedar akan fakta ini, telah memfailkan afidavit yang kedua dalam usul pemula meminta kebenaran mahkamah meminda usul pemula untuk memasukkan permohonan untuk melanjutkan masa. Responden tidak membantah. e

f

g

h

i

- a* Pada masa perbicaraan, hakim yang arif telah memutuskan bahawa permohonan untuk melanjutkan masa telah tidak dibuat dengan wajarnya dan oleh kerana itu, telah menolak usul pemula yang dipinda dengan kos, tanpa mendengarkan merit permohonan tersebut. Maka perayu telah merayu terhadap keputusan tersebut.
- b* Isu untuk dipertimbangkan adalah samada terdapatnya perlaksanaan budibicara yang wajar ketika hakim yang arif telah enggan memberikan perlanjutan masa. Hakim yang arif mendasarkan penghakimannya menurut keputusan bahawa terdapatnya kecacatan prosedur kerana permohonan untuk melanjutkan masa telah tidak dibuat dengan wajar. Dia menyatakan bahawa: (i) berdasarkan
- c* A. 3 k. 5 KMT, permohonan tersebut harus dibuat secara berasingan dan tidak patut disertakan kedalam usul pemula yang sama untuk mengeneipkan award tersebut; dan (ii) tidak terdapatnya keterangan yang mencukupi untuk melaksanakan budibicaranya.
- d* **Diputuskan:**  
**Oleh Siti Norma Yaakob HMR**
- e* [1] Aturan 3 k. 5(1) KMT tidak memerlukan permohonan yang berasingan untuk perlanjutan masa. Ianya hanya memberi kuasa budibicara kepada mahkamah untuk melanjutkan ataupun memendekkan masa dan dalam keadaan rayuan ini, ianya adalah untuk melanjutkan tempoh enam minggu untuk meliputi tempoh dari 3 Julai 1995, ketika tempoh enam minggu telah tamat, kepada 1 September 1995 ketika usul pemula telah difailkan.
- f* [1a] Maka hakim perbicaraan telah salah arah ketika dia memutuskan bahawa permohonan untuk melanjutkan masa harus dibuat secara berasingan dan tidak dapat dipohon dalam usual pemula yang sama untuk mengeneipkan award tersebut.
- g* [2] Berdasarkan keterangan dalam afidavit, perayu telah percaya secara silap bahawa masa hanya berjalan dari tarikh penerimaan award tersebut pada 21 Julai 1995 dan dengan itu telah percaya bahawa ia telah memenuhi keperluan masa ketika usul pemula difailkan pada 1 September 1995. Penasihat undang-undang perayu telah tidak sedar akan implikasi A. 69 k. 4(1)(b) KMT dan perayu telah tidak dimaklumkan bahawa bekas peguamcaranya telahpun menerima notifikasi lebih awal lagi.
- h*
- i* [2a] Satu lagi sebab untuk kelewatan tersebut adalah masa yang diambil oleh kedua-dua pihak tersebut untuk berunding berkenaan dengan jumlah yuran dan perbelanjaan penimbangtara yang harus dibayar oleh mereka masing-masing.

[2b] Sebab-sebab untuk kelewatan tersebut telahpun diterangkan dengan memuaskan. Hakim yang arif telah tidak mempertimbangkan perkara-perkara tersebut kerana dia adalah lebih mementingkan fakta bahawa permohonan tersebut telah tidak difailkan secara berasingan; jikalau dia telah berbuat demikian, dia akan membuat keputusan yang berlainan.

[Rayuan dibenarkan.]

**Cases referred to:**

*Prodexport v. ED & F Man Ltd* [1972] 2 LLR 375 (foll)

*The "Archipelagos"* [1979] 2 LLR 289 (refd)

**Legislation referred to:**

Arbitration Act 1952, ss. 24(2), 27

Rules of the High Court 1980, O. 3 r. 5(1), O. 41 r. 5(1), O. 69 rr. 2(1)(c), 4(1)(b)

Rules of the Supreme Court [UK], O. 73 r. 5

*For the appellant - Shahul Hameed Amirudin (T Kuhendran with him); M/s Albar, Zulkifly & Yap*

*For the respondent - Mah Weng Kwai; M/s Mah Weng Kwai & Assocs*

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R1-25-134-95]

Reported by Mariette Peters-Goh

**JUDGMENT**

**Siti Norma Yaakob JCA:**

We had allowed this appeal with costs and we now give our reasons for having decided so.

In the court below, the appellant had on 1 September 1995 filed an application under s. 24(2) of the Arbitration Act 1952 (Act 93), to set aside an Award dated 22 May 1996. Pursuant to O. 69 r. 2(1)(c) of the High Court Rules 1980 (the Rules) the application was brought by way of an originating motion and it contains three main prayers.

- (1) The Award dated 22 May 1996 be set aside.
- (2) Costs of the application and of the arbitration be paid to the appellant by the respondent.
- (3) Any other order or relief that the court deems necessary.

- a* The Award was made following arbitration proceedings initiated by both parties before a court appointed arbitrator to determine disputes arising from a construction contract entered into between them. On 22 May 1995, the arbitrator published his Award by notifying the solicitors for both parties that the Award was ready for collection subject to his fees and expenses being paid in full. There was some delay in the payment of the fees and expenses but by 21 July 1995, both parties received a copy of the Award. Under the Award, the appellant are to pay the respondent RM510,560.09 being the compensation due for the premature termination of the construction contract, interest at 8% per annum from 5 May 1989 to date of realisation, costs of the Award assessed at RM81,031.46 and costs of the reference to be taxed.
- b*
- c*
- d* Upon receipt of the Award, the respondent's solicitors made written demands to the appellant's solicitors to pay up the amounts of the Award. These demands produced no response from the appellant and on 23 August 1995, the respondent filed originating summons, R2-24-45-95, seeking leave to enforce the Award under s. 27 of Act 93. The respondent, however withdrew this originating summons and filed a second one, R-24-49-95, on 28 September 1995 seeking substantially the same prayer as the first originating summons. In the meantime the appellant filed the originating motion, we had mentioned earlier supported by an affidavit affirmed by the appellant's company secretary setting out the various grounds for setting aside the Award.
- e*
- f* In his affidavit supporting the second originating summons, the respondent averred that the appellant's originating motion is barred by time as there had been non-compliance with O. 69 r. 4(1)(b) of the Rules that stipulates that an application under s. 24(2) of Act 93 may only be made within six weeks after the Award has been made and published to the parties. Since the arbitrator had made and published his Award to the parties on 22 May 1995 by way of notification to their respective solicitors, the six weeks period started to run from that date and expired on 3 July 1995. Clearly the respondent contended the appellant's originating motion was out of time as it was filed on 1 September 1995.
- g*
- h* The appellant on realising this remedied the situation by filing a second affidavit in their originating motion seeking leave to amend the originating motion to include a prayer for an extension of time. At the hearing of the originating motion on 20 November 1995, the respondent did not object to the amendment sought by the appellant and in allowing the amendment, the learned trial judge also ordered that the amended originating motion be filed and served on the respondent within 14 days and the hearing on the merits of the appellant's application be adjourned to 13 December 1995.
- i*

However the hearing took place on 23 January 1996 and the parties proceeded to argue on the appellant's first prayer for the abridgment of time, leaving the merits of the application to be decided upon the outcome of the first prayer. After a somewhat prolonged hearing, the learned trial judge held that the application for extension had not been properly brought before him and as a consequence thereof, he dismissed the amended originating motion with costs without hearing the merits of the application. It is against this ruling that the appeal before us is founded.

There were initial objections as to when the six weeks period under O. 69 r. 4(1)(b) of the Rules should run, with the appellant maintaining that time should be calculated from 21 July 1995 when the Award was received and the respondent contending 22 May 1995 when the notification was sent and received. Happily before us, the appellant have accepted that time started to run from 22 May 1995 and clearly they were out of time when they filed their originating motion on 1 September 1995. Perhaps they were swayed by the decision in the case of *The "Archipelagos"* [1979] 2 LLR 289, where the same phrase "published to the parties" appearing in the English Rules of Supreme Court as O. 73 r. 5 which incidently is in *pari materia* to our O. 69 r. 4(1)(b) of the Rules, has been interpreted to mean that publication to the parties is complete on notice.

Under these circumstances was there a proper exercise of discretion when the learned trial judge refused to grant the extension of time? From his written judgment it is clear that his refusal was based on his findings that

- (1) there had been a procedural defect as the application for extension had not been properly brought before him. He contended that it should have been made separately and not added to the same originating motion seeking to set aside the Award.
- (2) there was insufficient affidavit evidence to warrant the exercise of his discretion.

O. 3 r. 5(1) of the Rules contains the following provisions.

The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or discretion, to do any act in any proceedings.

The learned trial judge held that the aforesaid provisions stipulate for a separate application and that prayers for extension and setting aside the Award cannot be dealt with in one application. From our reading of the provisions, it is our considered opinion that O. 3 r. 5(1) makes no such stipulation. It merely empowers the court the discretion to extend or abridge time and in the circumstances of this appeal it is to extend the six weeks period to cover the

- a* period from 3 July 1995 when the six weeks period expired to 1 September 1995, when the originating motion was filed. The double-barrelled procedure (to borrow the words used by Mocatta J in the case of *Prodexport v. E.D. & F. Man Ltd.* [1972] 2 LLR 375;) adopted by the learned trial judge in the court below is to be discouraged for the same reasons that were expressed in
- b* the English case in the following manner.

- c* Now that a motion to set aside (or remit) an award must be made to a single judge (see O. 73 r. 2) and, accordingly by O. 3 r. 5, leave to extend the time within which to move to set aside an award after the expiry of the six weeks from publication allowed by O. 73 r. 5 must also be made to a single judge, it is clearly desirable, in most cases, for one notice of motion to be taken out asking for both kinds of relief. The same affidavit or affidavits may support both and the suggested course is likely to effect substantial economies over the somewhat clumsy double-barrelled procedure adopted here.

- d* Clearly the learned trial judge had misdirected himself when he held that an application for extension had to be separately made and cannot be prayed for in the same originating motion seeking to set aside the Award.

- e* We now turn to the more substantial issue as to whether there are sufficient material disclosed by the appellant in their affidavit as to the cause of the delay in filing the originating motion. Such material is to be found in the affidavit affirmed on 8 December 1995 by one Azizah bt Mohd. Noor, the appellant's company secretary. In the affidavit, she put the blame for the 59 days delay on the appellant's former solicitors, Messrs. Durai & Associates for the failure to notify the appellant of the receipt of the notification of publication on 22 May 1995, a fact which she had gathered from investigations
- f* with the employees of Messrs. Durai & Associates. All along the appellant was under the mistaken belief that time only started to run from the date of receipt of the Award on 21 July 1995 and as such they had met the deadline when they filed the originating motion on 1 September 1995, that being the last day of the six weeks period.

- g* Objection was taken by the respondent to this part of the affidavit evidence, as being hearsay, such evidence can only come by way of an affidavit from Messrs. Durai & Associates. We consider this contention to be without merit as O. 41 r. 5(1) of the Rules allows an affidavit to contain facts as the deponent is able of his own knowledge to prove. As the company secretary,
- h* Azizah is no stranger to the appellant. Her statement that knowledge of when Messrs. Durai & Associates had received the notification was gleaned through investigations conducted by the appellant's present solicitors is still subject to proof. In the case of affidavit evidence such proof can be provided by contemporaneous documents or the conduct of parties as tending to show that
- i* the evidence objected to is probable.

It has been shown that the originating motion filed on 1 September 1995 contained no prayer for an extension. Whilst such omission can be interpreted to mean that the appellant's legal advisers were not aware of the implications of O. 69 r. 4(1)(b) of the Rules, it is equally applicable to the appellant's contention that they were not aware that their former solicitors had received the notification earlier.

Another cause for the delay disclosed in Azizah's affidavit was the time taken by the parties to negotiate as to the extent of their respective contributions for the arbitrator's fees and expenses and the actual payments of their contributions.

It would appear that by 28 June 1995 (which was still within the six weeks period) agreement was reached that each party will bear half the costs of the Award and that each party would forward his share of the costs directly to the arbitrator. This is borne out by the letter appearing at p. 206 of the appeal records. It is not clear when the appellant paid their share of the fees and expenses but a letter dated 14 July 1995 from the respondent's solicitors indicate that the appellant paid their share before the respondent did so through his solicitors' letter dated 14 July 1995.

The learned trial judge did not consider these matters as he was more concerned that the application for extension be separately filed and had he done so, he would have arrived at a different conclusion. This is so as he had already held that the respondent would not suffer any irreparable damage if discretion is exercised as firstly the amounts of the Award are already deposited in a client-solicitor's account in favour of the respondent and an order had already been obtained to stay the enforcement of the Award.

Since delay has been satisfactorily explained, we had allowed the appeal by granting an extension of time in terms of prayer 1 of the amended originating motion, remitted the proceedings so that the substantive prayer to set aside the Award can be heard on its merits, ordered the respondent to pay the costs of the proceedings before us and in the court below and directed that the deposit be refunded to the appellant.

*a**b**c**d**e**f**g**h**i*